

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALLISON ENGINE COMPANY, :

4 INC., ET AL., :

5 Petitioners :

6 v. : No. 07-214

7 UNITED STATES, EX REL. :

8 ROGER L. SANDERS AND :

9 ROGER L. THACKER. :

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11 Washington, D.C.

12 Tuesday, February 26, 2008

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:06 a.m.

17 APPEARANCES:

18 THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf
19 of the Petitioners.

20 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States, as amicus curiae,
23 supporting the Respondents.

24 JAMES B. HELMER, JR., ESQ., Cincinnati, Ohio; on behalf
25 of the Respondents.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument today in Case 07-214, Allison Engine Company versus United States ex rel. Sanders and Thacker.

Mr. Olson.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PETITIONERS

MR. OLSON: Mr. Chief Justice, and may it please the Court:

The False Claims Act addresses and redresses fraud on the government, not on every recipient of government funds. The liability-imposing provisions of the False Claims Act refer ten times in a single sentence to a submission to the government, getting a claim paid or approved by the government, or defrauding the government. Liability is to the government and it's based upon the amount of damages that the government sustains.

20 years ago, construing an even broader statute, this Court unanimously determined that defrauding the government in any manner for any purpose does not include defrauding recipients of Federal funds. That's the Tanner case. The United States made the same arguments in the Tanner case in 1987 that it's making

1 today in connection with the False Claims Act, and this
2 Court unanimously decided that case that defrauding the
3 government did not include defrauding grantees or
4 recipients of Federal funds.

5 There is no evidence in this case that false
6 or fraudulent claims were submitted to the United
7 States. Indeed, we don't know from the record what was
8 submitted to the United States, when it was submitted to
9 the United States, what it contained.

10 JUSTICE GINSBURG: What about the
11 certificates of conformance with specifications of? I
12 believe they were the Navy's specifications and Allison
13 submitted to someone those certificates of conformance.

14 MR. OLSON: The district court very
15 carefully analyzed that evidence, as well as all the
16 other evidence in the case, Justice Ginsburg, and found
17 that an inference could not be drawn with respect to
18 what had happened or when it happened because there is a
19 time lag to drawing an inference from certificates of
20 performance when you don't know when those certificates
21 were made, when they were submitted to the government,
22 what they said.

23 JUSTICE GINSBURG: Could the government have
24 asked -- could the Navy have asked for them?

25 MR. OLSON: The Navy, you mean in connection

1 with the litigation or in connection --

2 JUSTICE GINSBURG: No. In connection -- the
3 Navy -- the engines are being supplied for Navy
4 destroyers and the Navy obviously has an interest in
5 making sure that the -- they measure up to the
6 specifications. So my question is whether in this
7 procedure for dealing with subcontractors there is any
8 kind of audit where the Navy can say, we want to see the
9 certificates of conformance for those engines or other
10 documents relating to them.

11 MR. OLSON: The answer to your question as I
12 understand it, Justice Ginsburg, is yes, the Navy had
13 the right to test the equipment, look at the -- look at
14 the specifications, examine the specifications, ask for
15 corrections if they were unsatisfied, to test the
16 products. The Navy had the right to do all of those
17 things.

18 And one -- fundamental to this case is we
19 don't know whether they did, whether they were satisfied
20 with the generators as ultimately delivered to them,
21 whether there were corrections, if there were
22 deficiencies or deviations from the specifications when
23 they were first submitted to the shipyards, whether
24 those were corrected, whether those deviations were
25 immaterial. Because --

1 JUSTICE KENNEDY: Did the Navy have the
2 right to audit the subcontractor's books?

3 MR. OLSON: It's my understanding -- I'm not
4 100 percent sure of that, Justice Kennedy, but it's my
5 understanding that the government did have the right to
6 follow the process all the way through. There's no
7 evidence that they did so.

8 JUSTICE KENNEDY: Suppose they audit the
9 subcontractor's books and they don't discover a fraud
10 and leave. Would there be liability then under your
11 view?

12 MR. OLSON: Well, I think it would depend
13 upon what was in the books and whether there was --

14 JUSTICE KENNEDY: The books show that X
15 dollars were spent for certain parts and that was far
16 too much. That was an inflated figure. It fools the
17 government. The government then paid the
18 subcontractor -- pays the contractor; the contractor
19 pays the subcontractor.

20 MR. OLSON: It -- that might be,
21 Justice Kennedy. Regarding the terms of the statute,
22 whether you might interpret that as providing under
23 (a)(2), providing a record or document to the government
24 with the intention that the government pay or approve a
25 claim, I think you'd have to examine the evidence in

1 that context.

2 What we don't have here, we don't know what
3 was submitted to the government. What the lawyers
4 representing the claimants in this case -- and this is
5 from page 5a of the appendix to the cert petition,
6 footnote 3. We -- this is what the -- when they were
7 asked about this issue: We haven't shown you the ship
8 yard's invoices to the United States and we're not going
9 to show you those. Because they are totally irrelevant
10 under the False Claims Act.

11 Now, that could not be more wrong, it seems
12 to us. You can't determine -- if there's going to be a
13 fraud, a claim of fraud against the United States, you
14 have to know what the United States received to see
15 whether it's fraudulent, to see whether any deviation
16 from the facts were material, whether the deviation from
17 the specifications where maybe the product was better,
18 maybe it deviated in an insubstantial way or an
19 immaterial way, maybe the government had an opportunity
20 to fix it.

21 We don't know whether there was reliance by
22 the government. We don't know whether there was a loss
23 by the government. And we don't know, if there was a
24 loss by the government, the quantification for the loss.

25 JUSTICE BREYER: I must be just missing

1 something here. Tell me what I'm missing. What about
2 the definition of "claim"? It says a claim includes a
3 request under a contract for money or property, and the
4 request is made to the contractor if the United States
5 provides any -- any of the money.

6 Is there an issue here as to whether some of
7 the money provided -- are you saying there was no money
8 provided by the United States or maybe there was no
9 money provided?

10 MR. OLSON: No. The way the record -- the
11 record is a little confusing with respect to that,
12 Justice Breyer, but I think that one of the witnesses --
13 I don't know how he knew --

14 JUSTICE BREYER: Yes.

15 MR. OLSON: But one of the witnesses said,
16 yes, the money that we received was money that came from
17 the United States.

18 JUSTICE BREYER: Well -- so why doesn't that
19 end it? Why doesn't -- how do you win, then, given the
20 language I just read?

21 MR. OLSON: Well, that's the definition of
22 the word "claim."

23 JUSTICE BREYER: "Claim." And there has to
24 be a claim.

25 MR. OLSON: There has to be a claim. But

1 then section -- you're reading subsection (c).

2 JUSTICE BREYER: That's right, that's right.

3 MR. OLSON: Subsection (a) provides the
4 standard for liability. So you can have a claim, but
5 you're not liable for a false claim unless it's
6 submitted to the government, unless it's knowingly made
7 to get a fraudulent claim paid or approved by the
8 government.

9 JUSTICE KENNEDY: Well, you say (a), but
10 we're talking about (a)(2) --

11 MR. OLSON: Yes.

12 JUSTICE KENNEDY: -- in connection with (c).

13 MR. OLSON: Yes. I -- I'm looking at the
14 statute --

15 JUSTICE KENNEDY: But you were quoting from
16 (a)(1).

17 MR. OLSON: No, I quoted from both (a)(1)
18 and (a)(2). (A)(2) --

19 JUSTICE KENNEDY: I know that, but doesn't
20 (a)(2) stand by itself, especially as -- as (c) is
21 written, (c) and (2), (c) and (a)(2) make perfect
22 grammatical sense without any presentation to the
23 government.

24 MR. OLSON: Well, it reads out the words "by
25 the government" from that section, which is what the

1 statute looked like until it was specifically amended.

2 JUSTICE STEVENS: Well, the words "by the
3 government" are in (a)(2).

4 MR. OLSON: Pardon me?

5 JUSTICE STEVENS: The words "by the
6 government" are in (a)(2).

7 MR. OLSON: They are in (a)(2), but the way
8 Justice -- the way Justice Kennedy was reading it, I
9 respectfully submit, would read out those "by the
10 government." What (a)(2) --

11 JUSTICE SCALIA: You're saying, in addition
12 to being a claim, that's not enough reliability? It has
13 to be a claim that's presented to the government?

14 MR. OLSON: It's presented to the government
15 and --

16 JUSTICE SCALIA: And all that (c) does is
17 tell you what a claim is. So that, even if it's not a
18 claim against the government but just a claim against a
19 subcontractor, that still can be the basis for liability
20 so long as it's presented to the government.

21 MR. OLSON: It's presented to the government
22 or, under (a)(2), knowingly made to get --

23 JUSTICE STEVENS: But (a)(2) says it has to
24 be paid or approved by the government.

25 MR. OLSON: It has to be made or used to get

1 a claim paid or approved. In other words, it has to be
2 something that's created, then given to the government,
3 so in order to get a claim paid or approved by the
4 government. What I am --

5 JUSTICE KENNEDY: But you said given to the
6 government. It's "paid or approved by the government."

7 MR. OLSON: Well, I think a reasonable
8 reading of the statute is -- and this is essentially
9 what this Court unanimously decided 20 years ago in the
10 Tanner case, that these cases about defrauding the
11 government must involve something that causes the
12 government to suffer a loss, some something that impacts
13 the government. Even -- even the government today is
14 making the same statement that there has to be a loss.

15 What I'm saying with -- it's important,
16 Justice Kennedy, that -- that if you are going to want
17 to get something paid or approved by the government, you
18 have to do something that gets it to the government in
19 some fashion.

20 And reading (a)(1) and (a)(2) and (a)(3) and
21 the Tanner decision and the history of this statute from
22 1863 all suggest very strongly, I submit, the plain
23 language of the statute is that it's -- involves fraud
24 against the government.

25 Now, you may submit something to a prime --

1 you may be a subcontractor that submits something to the
2 prime contractor, and this very -- this case is a very
3 good example of it, and this case is very much like the
4 Tanner case. What did the prime contractor do with it?
5 If it was false or deficient or out of specifications,
6 the prime contractor had a right to say: Wait a minute,
7 tighten those bolts up a little bit more, or we're going
8 to deduct it, a little price from that, and we're going
9 to tell the government that there's a deviation from the
10 specifications.

11 JUSTICE GINSBURG: But if it's disguised,
12 how would the -- how would the prime contractor know?

13 MR. OLSON: Well, that's just the point,
14 Justice Ginsburg. We don't no one way or the other
15 unless the evidence is submitted. We don't know what
16 the government received, so we don't know whether the
17 government was deceived. So, if I submit that it might
18 well be in this case -- we don't know how much time
19 elapsed between the submission of the invoices or the
20 other materials from the subcontractor to the prime
21 contractor. What happened then between then and when
22 the ships were delivered to the Navy? Lot of things
23 could have happened. We don't know.

24 JUSTICE GINSBURG: But there wasn't any
25 trial, was there?

1 MR. OLSON: There was a trial.

2 JUSTICE GINSBURG: There was?

3 MR. OLSON: And there was a motion at the
4 close of the evidence of the plaintiff's case. And at
5 that -- it's at that point that counsel said: We are
6 not going to show you the invoices to the United States.
7 We're not --

8 JUSTICE GINSBURG: Well, how could -- they
9 would have at a minimum, even if your theory is not
10 correct -- they would have to prove loss to the
11 government. Otherwise they would have no claim.

12 MR. OLSON: That's -- that's correct,
13 Justice Ginsburg. And that's my point.

14 If you can't -- if you don't know what went
15 to the government, you don't know whether a claim or a
16 document or a statement, to use the words of the
17 statute, went to the government, you don't know whether
18 what the government got was false; you don't
19 know whether they --

20 JUSTICE SCALIA: Does the other side concede
21 that point, that you have to prove loss to the
22 government? I don't think they do, do they?

23 MR. OLSON: I'm not sure. I think --

24 JUSTICE SCALIA: I don't think they do.

25 MR. OLSON: What the statute says --

1 JUSTICE GINSBURG: Well, the government
2 certainly has that in its brief.

3 MR. OLSON: What the statute says is that it
4 is liability to the government for the damage the
5 government sustains. Now, it may well be -- there's
6 penalties even if there isn't damage to the government.
7 I would concede that.

8 JUSTICE SCALIA: You could say that the
9 missed funds which are in the hands of subcontract -- of
10 contractors, harms the government, even though it
11 doesn't come out of the government's pocket, because
12 those funds were given for a particular purpose, and if
13 that purpose is frustrated, the government is harmed.
14 That would work, without saying that the government has
15 lost any money.

16 MR. OLSON: Well, you could say that, but
17 you don't know whether the government got what it
18 wanted. You don't know whether the -- if something
19 deviates from specifications in a contract, it might
20 deviate on the plus side of something, it might deviate
21 in an immaterial way.

22 The contractor, the prime shipyards here,
23 and the government had the right to correct any
24 deficiencies.

25 JUSTICE SCALIA: Well, suppose the

1 government gives money for building schools, okay, to a
2 State and a fraudulent claim is submitted as -- in
3 connection with the construction of the school.

4 The government has been cheated in that the
5 money it gave for a school is not going to the school;
6 some of it is going into the hands of the fraudulent
7 contractor.

8 MR. OLSON: Well, what you've done with your
9 question, Justice Scalia, is left out the link. What
10 happened -- what -- the government may have made
11 -- given money to the schools. Subcontractors might
12 have submitted something false. The prime contractor
13 might have discovered it and said: Correct this or --

14 JUSTICE SCALIA: I understand that, but
15 that's a different point.

16 MR. OLSON: No, it isn't --

17 JUSTICE SCALIA: I am talking now about the
18 point of whether the government itself has to suffer any
19 harm other than the fact that the money it gave was not
20 used for the purpose for which it gave it. That alone,
21 it seems to me, could be harm.

22 MR. OLSON: Well, it -- it might under some
23 circumstances be harm. It might not under other
24 circumstances be harm. It might be misleading in an
25 immaterial way. It might -- there might have been no

1 reliance by the government. There might have -- the
2 government might have said -- the contract between the
3 prime contractor and the subcontractor might have
4 different requirements than what the government wants.
5 None of those --

6 JUSTICE KENNEDY: Mr. Olson, it seems to me
7 you're fighting a hypothetical. Let's say they built a
8 lousy school, sub-spec. The roof is falling in; the
9 plumbing leaks. It's a fraud, but they've given the
10 money, the feds have given the money to the States and
11 the States have let this slip by. Justice Scalia's
12 point was the Federal Government has been injured.

13 MR. OLSON: The Federal Government may have
14 been injured. The question is what does this statute
15 redress? There are other statutes. There's a major
16 fraud provision of Title 18 that has major penalties for
17 fraud by subcontractors against contractors in
18 connection with public projects just as the one -- like
19 the ones you're describing.

20 But if this Court's Tanner decision is
21 correct -- and it was only 20 years ago; it was
22 unanimous -- it defined the term "defrauding the
23 government" and it said "defrauding the government"
24 means defrauding the government, not filing a false
25 claim --

1 JUSTICE BREYER: But that's why the
2 definition -- it seems to me at the moment -- that's why
3 I'd like your view -- that the language is perfectly
4 ambiguous, the language of "knowingly makes a false
5 statement to get a false claim paid."

6 Now, the "false claim" is the claim that
7 they made to the contractor, because that's the
8 definition. And you are saying: Well, they made this
9 statement to get a false claim paid by the government.
10 Now, you could read those words "paid by the government"
11 to say "and there has to be a causal connection," which
12 is what you're saying, that you have to make the false
13 statement, make the claim, and that led the government
14 to pay.

15 But you could also say it's paid by the
16 government when the money to pay it comes out of
17 government funds, because it was paid by the government
18 even though the government gave the money to build the
19 school 100 years ago. But it's there in the bank
20 account, and then the contractor took the money from the
21 bank account that the government put in and paid it. In
22 such a case, linguistically, you can say it's paid by
23 the government.

24 MR. OLSON: It has to be a false claim paid
25 by the government.

1 JUSTICE BREYER: It was a false claim.
2 That's there.

3 MR. OLSON: What -- Justice Breyer, what is
4 missing from your hypothetical is what went to the
5 government. Suppose the prime contractor decided that
6 the paint was off-white instead of white, and that was
7 satisfactory.

8 Suppose the subcontractor said to the
9 government: This is a major project; this is
10 a billion-dollar project; there are all these little
11 things that are out of specifications and could be
12 called false or fraudulent or misleading; we're going to
13 disclose all of these things to the government. The
14 government has a complete opportunity to test them, look
15 at them, and decide whether it's satisfied. Then the
16 government isn't deceived.

17 JUSTICE BREYER: Well, it doesn't say that.
18 It says it was a false claim, which it was. It's false,
19 and it is a claim to the general. And was it paid by
20 the government? Yes. It was paid by the government,
21 even though everything you said is true, because the
22 money to pay it came from government funds. So that's
23 why I'm having a problem. I can read those words "paid
24 by the government" either way.

25 MR. OLSON: Well, I think you are taking the

1 words and isolating them.

2 JUSTICE BREYER: That's true.

3 MR. OLSON: It is knowingly making a false
4 record or a false statement to get a false claim paid.
5 If the government didn't pay a false claim, then (a)(2)
6 doesn't provide for liability.

7 JUSTICE SOUTER: Well, that's not strictly
8 correct. I mean, it "paid or approved."

9 MR. OLSON: Yes, I should have said --

10 JUSTICE SOUTER: -- which means there is a
11 third way, and the third way of reading it is if the sub
12 makes the false statement to the general contractor in
13 order ultimately to get a false claim, i.e., the
14 ultimate contractor's claim for conforming work,
15 approved or this particular claim approved by the
16 government when the government makes the ultimate
17 decision to pay the general contractor, that would be
18 covered by (2).

19 MR. OLSON: Well, if -- I should have said
20 the word "approved" because I -- I was shortening it up.
21 But it does say "paid or approved." But what has to be
22 done is that the government has to -- what has to be
23 submitted is something to cause the government to pay or
24 to approve a false claim to the government.

25 JUSTICE SOUTER: But that can simply be done

1 by the false claim to the general contractor, who either
2 accepts it as true or, for that matter, knowingly
3 understands that it is false, and ultimately submits the
4 same claim, i.e., as an element of its ultimate bill for
5 the whole project.

6 MR. OLSON: Well, what I might say in
7 addition to what I have said, Justice Souter, is that
8 there is no stopping point for that theory. The
9 government says as long as the project involved Federal
10 money, as long as the project used Federal funds, as
11 long as the project might endanger the Federal fisc, as
12 long as the program is financed in part by Federal
13 money, there would be liability under this statute.

14 Given the tens of thousands of government
15 contracts, government funds, government financing of
16 States, localities, universities, and so forth, there is
17 no limiting point. And what --

18 JUSTICE SOUTER: With respect, I think there
19 is a limiting point. You are certainly right when you
20 talk about the thousands of contracts that the
21 government ultimately makes or finances for the benefit
22 of lower units of government. But it does not follow
23 from the government's theory that if the United States
24 makes grants to a sub-unit of government, not for the
25 purpose of a given contract or a given project, it

1 simply makes grants, revenue-sharing sorts of things, it
2 doesn't follow from the government's position that when
3 one of those sub-units of government then makes a
4 contract spending part of that money, that it's covered
5 by this statute.

6 This statute would cover the myriad of
7 grants made for particular contracts. It would not
8 cover every subset of funds in a lower government unit,
9 some of which had been contributed by the national
10 government.

11 MR. OLSON: I don't -- I don't think, with
12 respect, that that's a fair reading of what the
13 government said either in the Tanner case, think making
14 essentially the same arguments which were rejected
15 unanimously by this Court, or what it says in its brief
16 to the Court today.

17 JUSTICE GINSBURG: Well, perhaps we should
18 ask the government to explain what its position is. But
19 one of the points that has been raised in opposition to
20 your argument is that your interpretation would cut out
21 claims that today are regarded as properly presented
22 under the False Claims Act.

23 And the one that was featured was false
24 claims for Medicare or Medicaid reimbursement, because
25 those are presented not to the government but to an

1 intermediary.

2 MR. OLSON: In -- with respect to that, the
3 government filed a brief in a case called Atkins versus
4 McInteer in the Eleventh circuit, and I have the brief
5 here -- it is not part of the material that is before
6 you -- in which the government said that even if the
7 District -- D.C. Circuit decision that's involved in
8 this case, the Totten case, was correctly decided, those
9 Medicare-Medicaid cases would be substantially covered
10 under the statute even under that construction because
11 the provider's claim is passed on by the insurer to the
12 Medicare agency or entity.

13 Now, I don't know, Justice Ginsburg, the
14 facts of that case or the facts of all of those
15 circumstances. But the fact is that if you take this
16 statute as it was enacted in 1863, all of this used to
17 be a part of one section that talked in the first case,
18 the first instance, one sentence which discussed in the
19 first instance a presentation of a claim to the
20 government and which was the liability to be imposed
21 upon the claimant.

22 The second part of the sentence said -- it
23 was intended to cover the people aiding the fraud, those
24 people that provided with records or statements in order
25 to get the payment made.

1 And then the third provision was the
2 conspiracy provision.

3 Those were broken out into the subsections
4 you see today. In 1982, Congress specifically said: We
5 are simply codifying the statute; we're not changing the
6 statute. We are making no substantive changes in the
7 statute.

8 If you read that provision in the context of
9 the Marcus versus Hess case, which was in the early
10 '40s, in which the government -- in which the Court
11 specifically said there's liability for an intermediary
12 causing a -- Federal Government to pay the claim. But
13 in that case, the invoices were passed on, and the --
14 and the government entity in that case, the Public Works
15 Administration, had the opportunity to review and
16 approve --

17 JUSTICE GINSBURG: So the whole
18 difference -- the whole difference, then, is if the --
19 the invoices are passed on, as opposed to the government
20 having the right, if it so chooses, to inspect the books
21 and records?

22 MR. OLSON: I think I may not have heard
23 your question. In the --

24 JUSTICE GINSBURG: The difference is if the
25 government gets the invoices from the contractor, then

1 there's a claim under the False Claims Act. But if,
2 instead, the subcontractor is required to make its books
3 and records available on request to the government,
4 that's not enough?

5 MR. OLSON: Well, I -- I think -- it's
6 certainly not this case, because the -- although the
7 government had an opportunity to do these things, we
8 don't know what happened.

9 JUSTICE GINSBURG: But it made -- I thought
10 you said that it is this case that the government had
11 the right --

12 MR. OLSON: If --

13 JUSTICE GINSBURG: -- to audit the --

14 MR. OLSON: The problem is, as this Court
15 said in the -- unanimously in the Tanner case, given --
16 forgive me for doing this, but it's important -- given
17 the immense variety of ways the Federal Government
18 provides Federal financial assistance, always
19 accompanied by some restrictions or conditions on its
20 use, the inability of the substantial supervision
21 language which the government was advancing then, which
22 it's sort of advancing now, does not provide any test
23 for any real guidance or --

24 JUSTICE KENNEDY: But the Tanner case didn't
25 confront the statute which has the definition of claims

1 that Justice Breyer is putting to you.

2 MR. OLSON: Yes --

3 JUSTICE KENNEDY: This statute that we're
4 looking at, in effect, defines what a fraud against the
5 government is.

6 MR. OLSON: Yes, but it -- but when it
7 was -- when it added that section, it specifically added
8 in the words "by the government," which those words were
9 added after the legislative history that both the
10 Respondents and the government cite. And it did not
11 change, Justice Kennedy, the definition of "liability."
12 It simply defined "claim." If the Court --

13 JUSTICE SCALIA: Am I correct in this that
14 without the claim definition, the statute would not
15 cover a fraudulent submission by the subcontractor to
16 the contractor which is known to be passed on to the
17 government ultimately?

18 MR. OLSON: No, I think --

19 JUSTICE SCALIA: Without that definition,
20 the claim would be made against the contractor, not
21 against the government.

22 MR. OLSON: I --

23 JUSTICE SCALIA: And, therefore, wouldn't be
24 a claim.

25 MR. OLSON: I think under both the -- if the

1 claim by the subcontractor to the contractor is intended
2 to be passed on, that the -- that the contractor is an
3 intermediary, then under Marcus versus Hess, which is
4 the situation there, there could be liability.

5 I'd like if I could, Mr. Chief Justice, to
6 reserve the balance of my time.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 Mr. Olson.

9 Mr. Stewart.

10 ORAL ARGUMENT OF MALCOLM L. STEWART,

11 ON BEHALF OF THE UNITED STATES,

12 AS AMICUS CURIAE,

13 SUPPORTING THE RESPONDENTS

14 MR. STEWART: Mr. Chief Justice, and may it
15 please the Court:

16 I'd like to begin with the same point that
17 Mr. Olson began with, namely, does the False Claims
18 Act -- is the False Claims Act directed solely at
19 schemes to defraud the government or does it encompass
20 schemes to defraud people who receive Federal money?
21 And we're in agreement with Petitioners that the False
22 Claims Act is directed at schemes to defraud the Federal
23 Government.

24 Our theory in this case is not that the
25 subcontractors are potentially liable because they may

1 have attempted to defraud the prime contractors. Our
2 theory is that the subcontractors are potentially liable
3 because they are alleged to have used false
4 representations made to the prime contractors but with
5 the ultimate purpose of defrauding the United States.

6 And I think if you imagine what would have
7 happened if the allegations in this case are true and if
8 the fraudulent scheme had been carried to completion,
9 it's very clear that the government, rather than the
10 prime contractors, would have been the injured party.

11 CHIEF JUSTICE ROBERTS: Mr. Stewart, I don't
12 understand that point. Let's say Allison Engine is
13 defrauding Bath, but Bath makes ships for a lot of
14 people, boats, whatever they make. Allison Engine is
15 defrauding, saying these engines, you know, work this
16 way and, in fact, they don't.

17 It doesn't know Bath is going to use some of
18 them in a government ship as opposed to a private ship.
19 So you're saying in that context, since there's no
20 intent to defraud the government, there's no liability?

21 MR. STEWART: Well, we would say certainly
22 in the context where Allison knows that the engines are
23 to be used for private work, that the False Claims
24 Act would not --

25 CHIEF JUSTICE ROBERTS: It just sells them

1 engines. It doesn't know what Bath is going to do with
2 them. They are going to put some in private boats and
3 some in the government boats.

4 MR. STEWART: I think you could still have a
5 FCA claim, if in fact the work was being done for the
6 government contract. But whatever the correct answer to
7 that question in the circumstance where the
8 subcontractor really doesn't know what the ultimate
9 project is for, that's not the case here. The
10 subcontractor --

11 JUSTICE SCALIA: I have another question.
12 Suppose the subcontractor -- the fraud consists of
13 inflating the hours spent in a cost-plus contract. So
14 the subcontractor submits and receives payment for
15 \$10,000 more than the subcontractor deserved. All
16 right?

17 But that all comes out of the hide of the
18 contractor. The contractor gets the same amount of
19 money from the Federal Government and the fraud only
20 harms the contractor.

21 MR. STEWART: Our view is that that would
22 not be covered.

23 JUSTICE SCALIA: That would not be --

24 MR. STEWART: That would not be covered. It
25 would --

1 JUSTICE SCALIA: Why?

2 MR. STEWART: Because the statute -- if you
3 look at page 2 of the blue brief, that reproduces the
4 relevant provisions of the statute. And the one that
5 we're principally -- the two that we're relying on here
6 are subsection 2, which says: "Knowingly makes, uses or
7 causes to be made or used a false record or statement to
8 get a false or fraudulent claim paid or approved by the
9 government."

10 And we would say that the reference to false
11 or fraudulent claim paid or approved by the government
12 should be taken as limited to a claim that is false as
13 to the government. That is, it's false in a respect
14 that the government cares about.

15 JUSTICE SOUTER: -- injured by it because
16 it, in effect, gets less than it paid for?

17 MR. STEWART: Well --

18 JUSTICE SOUTER: If it were a cost-plus
19 contract, the government would pay an extra 10,000 and
20 it would lose.

21 MR. STEWART: That's right.

22 JUSTICE SOUTER: If they -- if they simply
23 supplied defective parts, the government would get less
24 of a machine than it paid for. But in the -- in
25 Justice Scalia's example, the government ultimately ends

1 up with exactly what it bargained for, and the person
2 who's out is the person who paid for too much labor,
3 which is general -- is that your --

4 MR. STEWART: That's correct. And in that
5 circumstance, I think the scheme could fairly be
6 characterized as one to defraud the prime contractor,
7 because the prime contractor would bear the loss
8 associated with the scheme. And we would agree that
9 that's not covered. Here --

10 JUSTICE BREYER: What you are saying is
11 covered, I take it -- and this is -- I want to know how
12 this has worked out -- what is covered is -- imagine
13 government grant programs. And suppose there are vast
14 numbers of grant programs now that go to all kinds of
15 entities throughout the country, and a large portion of
16 which are just grants. They're paid and the government
17 is not going to get a penny back.

18 Now, there are instances of frauds in such
19 situations of subs against the person who gets the
20 grant. And in -- I can't imagine a case -- maybe
21 imagine, but it would be imaginary -- where the
22 Government couldn't say: But we got less than the grant
23 was supposed to pay for.

24 And you're saying all those are covered. Is
25 that right?

1 MR. STEWART: I mean, I think our test would
2 be, is the effect of the fraud to cause the money
3 provided by the Federal Government to be diverted to
4 purposes --

5 JUSTICE BREYER: To get less than it was
6 supposed to get.

7 MR. STEWART: I --

8 JUSTICE BREYER: And so this is what
9 surprises me on your side. It's 20 years later. And if
10 all those things are covered, given the vast extent of
11 government grant programs in the United States, has your
12 interpretation worked to bring within this statute, and
13 lots of qui tam cases against municipal frauds of all
14 kinds, things that they just never thought of at the
15 time of the Civil War? Do you see what the question is?

16 MR. STEWART: I mean, I think -- I think it
17 has basically worked. I don't think it has worked
18 perfectly. But I don't think --

19 JUSTICE BREYER: Have there been a lot of
20 such cases?

21 MR. STEWART: I think there are a lot of
22 cases -- I mean, Medicare and Medicaid fraud is an
23 example that we would deal with differently textually,
24 but those are programs in which the Federal Government
25 provides money. Persons other than Federal officials

1 decide whether the claims should be paid, but ultimately
2 there's reimbursement by the Federal Government. Now,
3 our answer to the question --

4 JUSTICE GINSBURG: Mr. Olson said on the
5 Medicare that the providers, that the intermediary does
6 present the --

7 MR. STEWART: And our view is that those
8 would be covered even if there is a presentment
9 requirement, because subsection (a)(1) of the statute
10 refers to a person who knowingly causes a false claim to
11 be presented to a Federal official.

12 So because there's the reimbursement
13 mechanism we think that would be covered. But a big
14 part of our argument here is that the applicability of
15 the FCA should not depend on these sorts of quirks of
16 timing. That is, to take the school hypothetical that
17 was discussed in the first part of the argument, you
18 have provision of government money for -- Federal money
19 for construction of a school, and the contractors who
20 deal with the State agency defraud the State agency and
21 they produce a shoddy product.

22 Now, if the way that the funding program
23 works is that the State agency pays first and then
24 presents a claim for reimbursement to the Federal
25 Government, that would be covered even with the

1 presentment requirement.

2 CHIEF JUSTICE ROBERTS: Well, how far down
3 the line? I mean, let's take that hypothetical. The
4 government gives money to the State to build a school.
5 The school has to be painted as part of that, so the
6 school contractor, the prime contractor, takes some of
7 the money from the Federal Government and pays the
8 painter. The painter needs to buy paint. So the
9 painter takes some of the Federal money and pays the
10 paint company. The paint company has to get the
11 chemicals from somebody. So the paint company takes
12 some of the money and pays the chemical company. And at
13 that point, the chemical companies fraudulently added,
14 you know, a dollar on to the cost of the chemicals. So
15 that dollar goes all the way through. So the Government
16 ends up paying a dollar more because of the fraud five,
17 six, seven times down the line.

18 Can an uninterested person bring a qui tam
19 action against the chemical manufacturer because of that
20 fraud?

21 MR. STEWART: I think our answer would
22 probably be yes. A court might read a de minimis
23 limitation into the statute, but part of our point would
24 be that be that that --

25 JUSTICE SCALIA: A hundred dollars more a

1 can.

2 (Laughter.)

3 MR. STEWART: Well, the answer to that
4 hypothetical -- and the answer to that hypothetical
5 really has nothing to do with whether the statute
6 imposes a presentment requirement, because the
7 hypothetical --

8 CHIEF JUSTICE ROBERTS: It's not a
9 presentment requirement. That's in (a)(1). It's that
10 the claim be paid, the fault claim, be paid by the
11 government. And what you're saying is when the
12 government pays the State, that pays the school, that
13 pays the contractor, that pays the paint -- blah, blah,
14 blah -- that that is payment by the government of a
15 false claim because the chemical manufacturer six or
16 seven steps down the line commits fraud.

17 MR. STEWART: It could be an (a)(2)
18 question, but my point was that the same type of issue
19 could arise even with the presentment requirement,
20 because if the chemical manufacturer presents his own
21 bill to the paint company, who presents his bill to the
22 contractor who does the painting work, who presents his
23 bill, et cetera, et cetera --

24 JUSTICE SCALIA: He has to know that. He
25 has to know that his bill is going to be sent up the

1 line to the government. "Knowingly makes, uses or
2 causes to be made or used a false record to get a false
3 or fraudulent --

4 MR. STEWART: I guess I would say --

5 JUSTICE SCALIA: And if he knows it, serve
6 him right. But this other guy thinks he's just honestly
7 cheating the guy who's buying the chemicals.

8 (Laughter.)

9 MR. STEWART: Again, whatever -- whatever
10 the answer -- the point I was trying to make about the
11 timing is -- again assume away these issues about how
12 much might be de minimis. You have substantial fraud by
13 the contractor directed at the State agency. If the
14 State -- if the way the funding program works is that
15 the State agency then presents its own bill to the
16 Federal Government, we're going to have a good (a)(1)
17 case regardless of whether presentment is required,
18 because we're going to say the subcontractor, the person
19 who did the work, caused the State agency to submit a
20 false claim to the Federal Government and we can recover
21 on that theory.

22 MR. STEWART: But -- but if the government
23 provides the money up front, gives it to the State
24 agency and says, use it for the defined purposes, you'll
25 still have presentment of a claim by the State agency,

1 namely the request for funding, but there will be no way
2 to say that that difference --

3 JUSTICE BREYER: The difference is that
4 government money today is in everything. So if it's in
5 everything, then everything is going to become subject
6 to this False Claims Act. And of course I exaggerate by
7 using the word "everything," but only a little.

8 (Laughter.)

9 MR. STEWART: But the point about timing --
10 but the point about timing is if the State's claim is
11 submitted to the Federal Government at a time when the
12 fraud has not yet occurred, the State's claim can't be
13 denominated false, assuming that the State intends it --

14 JUSTICE KENNEDY: I don't know that that
15 accords with the definition of "claim" in (c).

16 MR. STEWART: Well, the definition of
17 "claim" in (c) says it's a request or a demand --

18 JUSTICE KENNEDY: It says the government
19 will reimburse.

20 MR. STEWART: Will reimburse, but it also
21 says "if the United States Government provides any
22 portion of the money or property which is requested or
23 demanded, or if the government will reimburse." And so
24 --

25 JUSTICE KENNEDY: But I meant provide. It

1 has provided it already.

2 MR. STEWART: That's correct. And my -- my
3 point is the definition of "claim" indicates that
4 Congress didn't want liability to turn on this quirk of
5 timing, whether the fraud occurs before the claim is
6 submitted to --

7 JUSTICE KENNEDY: So in your own school
8 hypothetical, there's liability.

9 MR. STEWART: There's liability if the
10 Federal Government reimburses a claim for expenses that
11 have already been incurred, but under Petitioner's
12 theory, if the Federal Government pays the money up
13 front, the State has submitted a claim but it's not a
14 false claim. And then if the contractor defrauds the
15 school -- the State, by producing a shoddy school, the
16 contractor can't be charged with having caused a false
17 claim to be submitted.

18 JUSTICE SCALIA: It doesn't shock me. I
19 don't know. It doesn't shock me at all. If indeed the
20 object of this is to prevent fraud upon the government
21 and if the government has not been deceived at all, get
22 yourself a new statute.

23 MR. STEWART: But our point is that --

24 JUSTICE SCALIA: This statute doesn't have
25 to cover every ill in the world.

1 MR. STEWART: That's correct. But fraud --
2 fraud against the government can occur whether -- the
3 whole point of the definition of (c) is that fraud
4 against the government can occur if Federal money is
5 diverted away from its intended purposes, whether the
6 deceit is practiced directly upon a Federal official or
7 a contractor or a grantee.

8 JUSTICE GINSBURG: Before -- before you
9 finish, the major objection is the one that Justice
10 Breyer just voiced, that your position is vastly
11 overbroad and every time there's government money there
12 will be -- one of these qui tam people can come in.
13 What are the limiting principles that you say attach to
14 this statute?

15 MR. STEWART: There are two principal
16 limiting principles. The first is that the bill has to
17 be submitted to the contractor or grantee in his
18 capacity as such. That is, there has to be a nexus
19 between the provision of Federal funds and the request
20 that's made. So if a subcontractor defrauds Boeing on
21 work that Boeing is doing for a private airline, there's
22 no FCA violation. Even though Boeing literally is a
23 government contractor, it's not being defrauded in its
24 capacity as such.

25 And the second is that the fraud has to be

1 of a nature that if successfully carried to completion
2 could be expected to injure the Federal Government. So
3 in the hypothetical of the cost-plus contract between
4 the prime contractor and the sub and the sub presents an
5 inflated bill, if the loss false on the prime contractor
6 and is not passed along to the government, the claim
7 would not lie under the FCA

8 JUSTICE SCALIA: But if injuring the Federal
9 Government would -- it would suffice to injure the
10 Federal Government that the schools are shoddy and the
11 roofs are leaking? That would be enough?

12 MR. STEWART: That would be enough.

13 JUSTICE SCALIA: Even though the Federal
14 Government is not out of pocket any more, but the
15 program that it -- that it was desirous of encouraging
16 is simply not as good as it would have been otherwise.

17 MR. STEWART: That's -- that's correct.

18 JUSTICE SOUTER: And you would still -- your
19 theory would still cover the case of the -- of the
20 agency that gets 10 percent of its budget by -- through
21 a general grant from the United States, no matter what
22 it spent its money on, regardless of the fact that the
23 United States has no connection with particular
24 contracts. If in fact a fraudulent claim was presented
25 to that agency, it would fall within the qui tam

1 statute?

2 MR. STEWART: We would still be asking was
3 the -- whether the fraud was of a sort that the Federal
4 Government cared about. That is, if the Federal
5 Government made a grant with no strings attached, use it
6 as you want.

7 JUSTICE SOUTER: Right, no strings attached.

8 MR. STEWART: Then there would be no FCA
9 liability.

10 JUSTICE SOUTER: Why wouldn't there be?

11 MR. STEWART: Because the fraud would not --
12 in that -- in that hypothetical, you would have
13 something akin to a fraudulent car repair bill passed
14 along, given to me. I happen to be a Department of
15 Justice employee and I might use my Federal salary to
16 pay the fraudulent claim. But we wouldn't say that's an
17 FCA violation.

18 JUSTICE SOUTER: No, but when your salary is
19 paid, in effect the government's interest stops when it
20 pays for your labor. In the -- in the hypothetical in
21 which the government funds 10 percent of a sub-agency's
22 operating budget, presumably its intent generalized goes
23 to everything that agency does.

24 MR. STEWART: Well, we would still ask
25 whether the government has -- the Federal Government has

1 placed meaningful limitations on the way in which the
2 money may be spent and whether the nature of the fraud
3 is to prevent those limitations from being honored.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Stewart.

7 Mr. Helmer.

8 ORAL ARGUMENT OF JAMES B. HELMER, JR.,

9 ON BEHALF OF THE RESPONDENTS

10 MR. HELMER: Mr. Chief Justice, and may it
11 please this Court:

12 Electricity is the critical component in a
13 modern warship that allows it to fight, to defend
14 itself, and to carry out its mission. Because of that,
15 the Navy imposed rigid requirements on all who work on
16 its generator sets in manufacturing those generator
17 sets.

18 Those rigid requirements were passed down
19 from the Navy to Bath. Bath was ordered by the Navy to
20 pass those down in writing to each of its subcontractors
21 who were going to work on these Gen-Sets, and Bath did
22 that. Each of the subcontractors in this case knew they
23 were working on the DDG-51 project, which is the Arleigh
24 Burke-class destroyers. They knew that military
25 requirements were called out in their paperwork that had

1 to be met; and they did not satisfy those military
2 requirements and yet submitted both claims for payment
3 and, as Justice Ginsburg has pointed out, certificates
4 of compliance.

5 If you look at the Sixth Circuit's joint
6 appendix at page 620, you're going to see, at paragraph
7 6.1 in the contract between Bath Iron Works and Allison,
8 the subcontractor, that Allison was required, when it
9 delivered the Gen-Sets to the shipyard to give a
10 certificate of conformance that all of these rigid
11 requirements had been satisfied, and that certificate of
12 conformance had to be given to the United States Navy.

13 And third, until that certificate of
14 conformance was given to the United States Navy, no
15 money; no money was going to be paid to Allison.

16 JUSTICE GINSBURG: Whose certificate is it?
17 Is it the contractor's certificate that everything that
18 the subs have done or the certificate of conformance
19 that Allison provided, that SOFCO provided?

20 MR. HELMER: Yes, ma'am. There are two
21 certificates of conformance, you're absolutely correct.
22 What I'm speaking of is the certificate of conformance
23 from the defendant in this case. They have to take and
24 give that to the shipyard that says: We have met all
25 the requirements, the Navy requirements; and we have to

1 give that to the U.S. Navy. The U.S. Navy then takes
2 that certificate and releases the Gen-Set. It's under
3 lock and key. It releases the Gen-Set --

4 JUSTICE SCALIA: I thought --

5 MR. HELMER: -- to be installed in the ship.

6 JUSTICE SCALIA: I thought it was not
7 established that anything from this defendant got to the
8 Navy.

9 MR. HELMER: You were told that earlier this
10 morning, Your Honor. I don't believe that's correct.

11 JUSTICE SCALIA: Well, where in the record
12 is there some indication that some -- some paper from --
13 with a fraudulent representation made it up to the Navy?

14 MR. HELMER: If you'll look at the joint
15 appendix, the Sixth Circuit joint appendix, at page 620;
16 it's clause 6.1 -- talks about the certificates. The
17 certificates are in the record starting at joint
18 appendix, Sixth Circuit joint appendix 515 --

19 JUSTICE SCALIA: Well, I know what
20 certificates are, I mean, you know, their general
21 content. But was there anything in the record that a
22 certificate from Allison went to the Navy with Allison's
23 signature on it?

24 MR. HELMER: Yes, Your Honor. The contract
25 with Bath required the Navy to receive that for Allison

1 to be paid. There was evidence in this case that
2 Allison was, in fact, paid for delivering these
3 Gen-Sets. That's circumstantial evidence that they did
4 submit their certificates of conformance --

5 JUSTICE ALITO: What about the statement
6 that Mr. Olson quoted during his argument, when counsel
7 for plaintiffs said to the jury: You haven't seen
8 anything that was submitted to the Navy and you're not
9 going to see anything that was submitted to the Navy?

10 MR. HELMER: No, Your Honor. That -- I made
11 that statement, and that was not my statement.

12 JUSTICE ALITO: Well, what was your
13 statement?

14 MR. HELMER: My statement was: You are not
15 going to see the invoices from Allison -- the invoices,
16 not the certificates of conformance, not the invoices
17 from Bath to the Navy. You're not going to see those.
18 But the invoices from Allison to Bath were all admitted
19 into the record in this case. They're all summarized.

20 JUSTICE SCALIA: Well, then there's less to
21 this case than we had thought. My goodness, even under
22 the Petitioner's theory, you win. If indeed a
23 fraudulent document was given to Bath and Bath passed
24 that on, I think the Petitioners would have conceded --

25 MR. HELMER: Your Honor, this case --

1 JUSTICE SCALIA: -- that there's a cause of
2 action. What is all this fuss about, then?

3 MR. HELMER: This case is not a outlier on
4 the ends of this statute. It is squarely in the middle
5 of (a)(2).

6 JUSTICE SCALIA: I wish you had said that in
7 your brief because we could have saved ourselves a lot
8 of reading.

9 (Laughter.)

10 MR. HELMER: Your Honor, anything that I can
11 do to help the Court. I apologize if I didn't write the
12 brief better than I could have.

13 But I do have another point that I -- that I
14 would like to make in addition to what's in the record
15 in this case. If you go back and look at the 1863
16 version of the False Claims Act, which continues on in
17 1943, the statute talks about in the second clause --
18 and the second clause is what is now known as (a)(2) --
19 it talks about a false record or statement being made
20 for the purpose of obtaining or aiding to obtain
21 payment. It does not say, and it never said, that there
22 has to actually be payment, there has to actually be
23 payment.

24 Now the statute reads today "to get a false
25 or fraudulent claim paid or approved by the government."

1 My point is -- and the Rainwater case, Justice Scalia,
2 that I think you may have been referring to says that --
3 the government does not have to have a monetary loss for
4 there to be a False Claims Act violation. However, for
5 there to be a violation of (a)(2), the false record or
6 statement that's presented, the false record or
7 statement that's made, has to be made with the purpose
8 of reaching Federal funds. That's what the statute
9 originally said. That language was taken out in 1982.
10 We all seem to agree that the '82 recodification did not
11 change any of the meaning or purpose of the statute --

12 CHIEF JUSTICE ROBERTS: So your argument --
13 your understanding of the scope of the statute is
14 exactly the same if the words "by the government" were
15 replaced by "with Federal funds"? You think those
16 are -- you think the statute is exactly the same if it
17 said "with Federal funds" instead of "by the
18 government"?

19 MR. HELMER: Yes, Your Honor. I think
20 that's correct. I think that --

21 CHIEF JUSTICE ROBERTS: So when the
22 government -- when the phrase "by the government" was
23 added -- was it in '86?

24 MR. HELMER: Yes, Your Honor.

25 CHIEF JUSTICE ROBERTS: There were a lot of

1 statutes that said "with Federal funds," right?

2 MR. HELMER: There were.

3 CHIEF JUSTICE ROBERTS: So why did the
4 Congress add the phrase "by the government" instead of
5 "with Federal funds" if it meant the same thing?

6 MR. HELMER: The legislative history is dark
7 on that subject. But I have two answers for you,
8 Mr. Chief Justice. First, if you look at the '82
9 version of the statute, there were six liability
10 provisions set out. A seventh was added in '86, (a)(7).
11 But of the first six that were added in '82, when they
12 broke this long sentence down into parts, every one of
13 those provisions except for (a)(2) dealt with either "by
14 the government" or "defrauding the government." (A)(7)
15 likewise has such similar language.

16 My first point to you is that I believe that
17 when Congress amended this statute in '86 it wanted all
18 provisions to be consistent with each other in that
19 sense that we're talking about fraud on the government,
20 not fraud against private parties, fraud on the
21 government.

22 The second response I would make to you,
23 Mr. Chief Justice, is that we don't read "by the
24 government" as meaning presented to the government or
25 even paid by the government. We read "by the

1 government" as indicating that this is a limitation on
2 (a)(2), because without that language on (a)(2), if you
3 read the definition of "claim," then any claim or
4 private funds could be -- could have been covered by
5 (a)(2). By adding the words "by the government," the
6 Congress has limited this to directing to Federal funds.

7 CHIEF JUSTICE ROBERTS: Right. So I guess I
8 get back -- you read "by the government" as if it said
9 "with Federal funds"?

10 MR. HELMER: I do, Your Honor.

11 JUSTICE BREYER: Suppose -- you just said to
12 Justice Scalia -- if you have one minute; I rather
13 missed that -- that your point was if you lose on that
14 point you just made and it isn't "with Federal funds"
15 and it is that the government has to pay the claim, you
16 still win. That was your point to Justice Scalia, I
17 guess.

18 MR. HELMER: Yes.

19 JUSTICE BREYER: Well, what was that
20 argument? Because you said it wasn't in the brief, and
21 what is it? How do you still win?

22 MR. HELMER: Well, I believe they -- that
23 was the first point that I was making to Justice Scalia.

24 JUSTICE BREYER: Yes.

25 MR. HELMER: And my point there is that

1 (a)(2) covers making a false record or statement to get
2 a false claim paid or approved by the government.

3 JUSTICE BREYER: Yes.

4 MR. HELMER: In this case, they were
5 required -- Allison was required by its contract with
6 Bath and the Navy to submit a certificate of conformance
7 to Bath and the Navy to release the Gen-Set for
8 installation into the destroyer. Without that
9 certificate of conformance -- and we spent 5 weeks in
10 front of a jury talking about why they were false, why
11 each of those were false -- without that certificate of
12 conformance, the Gen-Set could not have been released to
13 be installed in the ship and Allison could not have been
14 paid. That's what section 6.1 of the contract provides.

15 JUSTICE ALITO: The the certificate of
16 performance made its way to the Navy. That was required
17 by contract. Why did you not introduce direct evidence
18 of that in your case?

19 MR. HELMER: We did put all the certificates
20 of conformance that were given to Bath in the record of
21 this case.

22 And all of those by the terms of Allison's
23 contract with Bath had to be shown to the U.S. Navy
24 employee on site at the shipyard. And that contract was
25 also admitted into evidence.

1 But we did not --

2 JUSTICE GINSBURG: But that was only the
3 contract. You didn't show that in fact that had
4 happened, that the certificates of conformance actually
5 were shown to a naval officer?

6 MR. HELMER: No, ma'am, we did not have a
7 witness who testified that this certificate was given to
8 Ensign So-and-So. But --

9 JUSTICE SCALIA: And whose -- whose contract
10 required this? It's a strange provision to be in the
11 contract between Allison and Bath.

12 MR. HELMER: It -- you are correct, Your
13 Honor. It was the contract between Bath and Allison
14 that I'm speaking about now that flowed -- that also
15 flowed down the U.S. Navy's requirements that these
16 Gen-Sets be -- be built rigidly to the specifications
17 set out by the Navy.

18 JUSTICE SCALIA: And that contract between
19 Allison and Bath said that this certificate from Allison
20 had to be presented to the Navy?

21 MR. HELMER: Yes, Your Honor. It had -- it
22 had to be shown to the Navy. If you want to get paid,
23 you have to show it to the Navy, and then the Navy will
24 release the Gen-Set. See they build these ships around
25 the Gen-Sets. They are so huge that you don't install

1 them on a destroyer; you build the destroyer up around
2 it. So before you can release those to the shipyard for
3 construction, you had to have the certificates of
4 conformance.

5 JUSTICE SOUTER: In the contract between the
6 Navy and Bath, was there a provision that Allison's
7 invoices would be shown to the Navy? In other words,
8 was the parallel provision in the contract with the --
9 with the general the same as the provision between the
10 general and the sub?

11 MR. HELMER: Justice Souter, it was
12 different. There is a provision I believe
13 Justice Ginsburg was referring to. You will find it at
14 page 415 of the Sixth Circuit's joint appendix. That
15 provision required that when Allison made a certificate
16 to get paid to the Navy -- I'm sorry, strike that --
17 when Bath made a certificate to the Navy to get paid, it
18 had to have available for the U.S. Navy all of the
19 underlying documentation. All of the bills, the
20 invoices, and certifications had to be available to show
21 the Navy.

22 JUSTICE SOUTER: Available but not
23 necessarily transmitted.

24 MR. HELMER: Not necessarily stapled to the
25 invoice and given to the Navy, but they had to be

1 available.

2 JUSTICE SOUTER: But the contract between
3 Bath and Allison says: You give those to us, and we
4 give them to the Navy. It was specific in saying they
5 go -- your invoices, your -- your certificates, go to
6 the Navy?

7 MR. HELMER: It was specific in saying your
8 certificate of conformance goes to the Navy.

9 JUSTICE SOUTER: Okay.

10 MR. HELMER: It did not say in the provision
11 that I have cited to the Court, your invoice.

12 JUSTICE SOUTER: I understand that.

13 MR. HELMER: And that was why I said,
14 Justice Alito, to the trial court, not to the jury, that
15 the invoices are irrelevant. And I -- I didn't make
16 that up. That comes out of the Bornstein opinion.

17 JUSTICE SCALIA: And Bath would have been in
18 breach of its contract with Allison unless it passed
19 these things on to the Navy? That's why I say it's a
20 strange provision to be in the contract between Bath and
21 Allison.

22 MR. HELMER: The certificate was required.
23 Your Honor, yes, that was required. The invoices had to
24 be available --

25 JUSTICE SCALIA: Allison could sue Bath for

1 not passing the certificate on to the Navy?

2 MR. HELMER: Well, I believe the way it
3 reads, Allison is supposed to hand the certificate to
4 the Navy employee at the shipyard.

5 CHIEF JUSTICE ROBERTS: So if in fact, as
6 you suggest, Allison submitted the certificate to the
7 Navy person at the shipyard, then the question presented
8 in this case is not in fact presented here? Because the
9 question presented assumes that there had not been a
10 submission to the Federal Government of the false --
11 false claim.

12 MR. HELMER: I think that's fair to say,
13 Your Honor.

14 JUSTICE SCALIA: Did you make this point in
15 response to the petition for cert?

16 MR. HELMER: We opposed the petition for
17 cert on other grounds. I did not cite the Court to the
18 joint appendix, the Sixth Circuit joint appendix at page
19 620.

20 JUSTICE SCALIA: Well, you know, usually we
21 take a case to decide the question presented; and if
22 this question is really not before us you should have
23 told us that.

24 MR. HELMER: Well, my understanding, Justice
25 Scalia, is under your Rule 26.2 I am permitted to bring

1 to the Court's attention additional information that was
2 in the joint appendix below. And that was what I was
3 attempting to do in response to Justice Ginsburg's
4 initial question that started the presentation today.

5 JUSTICE GINSBURG: There has been a
6 statement, in opposition to your position, that the way
7 you read (a)(2) would render (a)(1) useless, That
8 everything would fall within (a)(2).

9 Is there a distinction between what comes
10 under (a)(1) and (a)(2), in your view?

11 MR. HELMER: Yes, ma'am. That is pointed
12 out in the solicitor's brief at pages 18 and 19, the
13 silver brief, the distinction between (a)(1) and (a)(2).
14 (A)(1) can be a claim that just says, pay me; there's
15 nothing false on its face, but it is impliedly false
16 because it -- it's not entitled to be paid because the
17 requirements haven't been met.

18 (A)(2) would require a specific false
19 statement in that record or statement that's used.

20 JUSTICE GINSBURG: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 Mr. Helmer.

23 MR. HELMER: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Now, Mr. Olson, four
25 minutes.

1 REBUTTAL ARGUMENT OF THEODORE B. OLSON
2 ON BEHALF OF THE PETITIONERS

3 MR. OLSON: Thank you, Mr. Chief Justice.

4 Let me address the -- what seems to be a
5 controversy as to what was submitted to the Navy.

6 In the first place, the invoices were not
7 submitted to the Navy. We know that. That's the
8 provision that I quoted before.

9 The Plaintiffs in this case did not call a
10 single Navy witness. They did not call the prime
11 contractor as a witness. So we don't know what the Navy
12 received, or what the Navy did not receive.

13 With respect to the so-called certification,
14 that is addressed on pages 57a through 59a of the cert
15 petition appendix. This is a district court decision,
16 three pages of discussion.

17 This was an argument that the relators came
18 up with relatively late when they couldn't explain why
19 they didn't have the invoices or what actually went to
20 the Navy, and they argued that Bath submitted a false
21 implied certification.

22 Then the district court goes through the
23 evidence on pages 57a to 59a and concludes at the top of
24 59a there is no evidence of a requiring -- of a
25 required, continuing certification with respect to

1 quality, which is the issue tried in this case.

2 I don't have time to go through all of that
3 or all of the evidence, but that is backing and filling.

4 There -- and the question presented is a
5 correct question presented. As the relators put it to
6 the -- to the district court, we don't have to do that.
7 We are not going to show you --

8 JUSTICE STEVENS: Let me ask you this
9 question: Suppose they had submitted the qualification
10 certificate, but not a claim? Would they have had a
11 case, under your view?

12 MR. OLSON: If it was -- if the
13 qualification -- if a -- if a --

14 JUSTICE STEVENS: What I am really asking
15 is: Do they still need a claim?

16 MR. OLSON: I -- they -- there has to be --
17 no. Under (a)(2), Justice Stevens, you could submit a
18 statement intending to get a false claim approved or
19 paid by the government.

20 Now, the government can't approve anything
21 if it's not actually submitted to it, or not intended to
22 be submitted to it. That's in the same section of -- of
23 the statute.

24 Let me -- let me turn to the -- this is a
25 penal statute. There is a punitive statute, as you

1 pointed out, in the Vermont versus Stevens case.

2 There is no meaningful limitation on what
3 the government and the Respondents want in this case.
4 The government has now come up with this limitation:
5 Well, it must be really a government project.

6 Well, that isn't in the statute. That's
7 basically the same thing you unanimously rejected in the
8 Tanner case.

9 The government said in its brief if the
10 government is the ultimate source of the funds. That
11 goes back to the example that the Chief Justice was
12 making. There might be 15 different layers, the way
13 this government works. Money is fungible. It's
14 impossible to trace.

15 This statute is intended to address claims
16 made, or statements made in connection with claims made,
17 to -- to commit to defraud the government, and defraud
18 the government irrespective of the definition of
19 "claim," which could have been put in section (a), but
20 was not put in section (a), the liability section.

21 The Congress knows how to put those words in
22 statutes. They were in the major fraud statute, the --
23 the case that this Court distinguished in Dixon, in --
24 in Tanner. The Dixon case was money given -- paid to or
25 on behalf of the government. There is language like

1 that throughout the congressional statutes.

2 We don't know in this case whether the
3 government was defrauded, or was intended to be
4 defrauded, because there is this big space between what
5 went on between the subcontractors and the shipbuilders
6 and what went on between the shipbuilders and the
7 government.

8 There could have been all kinds of dialogue.
9 There could have been disclosures. There might be
10 deviations from the specifications in any kind of
11 government contract. But this statute has to have a
12 limitation point.

13 And if you look at it from 1863 up to the
14 present, it is intended just as the Tanner case said.
15 And in Marcus versus Hess you said that the criminal
16 false claim statutes have to be construed identically
17 with the civil false claims provisions if they contain
18 identical language. 371 has the same language as the
19 False Claims Act's, and the Tanner case is dispositive.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Olson.

22 The case is submitted.

23 (Whereupon, at 11:09 a.m., the case in the
24 above-entitled matter was submitted.)

25

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